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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, *Appellant*,

v.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees.*

On Appeal From the United States District Court for the Central District of California

BRIEF FOR THE CITY OF NEW YORK IN OPPOSITION TO MOTIONS TO AFFIRM

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Conceding that approval of a consent decree is a judicial act (G.M. at 14; D.M. at 15),[1] appellees move

[1] The abbreviation "G.M." refers to the government's motion to affirm; the abbreviation "D.M." refers to the defendant-appellee's motion to affirm. The abbreviation "App." refers to the appendices to the Jurisdictional Statement.

for summary affirmance. If this Court is prepared to hold without briefs and without argument that informed judicial action occurs when a district judge lays the decree alongside the complaint, the motions to affirm should be granted. But if, as we contend, this question of first impression requires careful briefing, oral argument and the delicate weighing of conflicting interests, this case deserves plenary consideration. We proceed briefly to demonstrate why this is so.

1. Both the defendants (D.M. at 8) and the District Court (App. at 12a) have confused the City's intervention application with applications filed by other parties. The City *did not* seek "to block the proposed decree in the hopes of compelling the parties to litigate this case to judgment." We do not seek to do so here. Rather, the City's consistent position has been that without some meaningful record on which to rely, neither the District Court nor anyone else can ever know whether this decree is in the public interest. As we put it below:

> "It may be that the proposed consent judgment is appropriate on the facts of this case and that its entry will not thwart the underlying policy of the antitrust laws. On the other hand, it may develop that such a judgment is decidedly not in the public interest and would enable these defendants to escape the consequences of their illegal acts as alleged in the complaint with little more than a 'slap on the wrist.' Until the Court has some meaningful basis for deciding which of these alternatives is the case, the City respectfully urges the Court not to approve the judgment."

2. In this Court, the United States candidly concedes that the district judge had an independent judicial function to perform when presented with the consent

decree (G.M. at 12). Performance of that function required that the judge have some factual knowledge of what the case was about. Yet only the parties know what the record compiled during five years of civil and criminal investigation showed, and they strenuously resisted sharing that knowledge with the court or with the other participants in the hearing below. Instead of requiring the proponents of the decree to furnish it with an appropriate factual record, the district court placed the burden of demonstrating why the decree should not be approved upon the non-party participants (App. at 3a-5a, 14a). Small wonder the court concluded that "no good reason appears to this Court for finding" the decree not to be in the public interest (App. at 14a), for under these procedures such a showing could never be made.[2]

3. Appellees suggest that any proceeding in which the District Court sought to inform itself of the facts would run afoul of Section 5(a)'s proviso. (G.M. at 13; D.M. at 16). In the other words, appellees contend that no matter what method the district judge might adopt to inform himself, that would constitute the "taking of testimony" within the meaning of 5(a). Not so.

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[2] It is true that 70% of the Government's antitrust cases are terminated by consent decrees (G.M. at 12, n.8). But the "overwhelming majority" of such consent decrees are routinely approved without opposition, and it is only in a very few cases that objections to proposed consent decrees are raised. ABA, Antitrust Section, *Antitrust Developments: 1955-1968*, 229 (1968). Accordingly, there is no reason to believe that the procedure which we propose will cripple the Department's enforcement of the antitrust laws (G.M. at 13).

Where, as here, a grand jury has taken testimony and received evidence during eighteen months,[3] it would not have been onerous to have required the parties to submit statements of their positions and summaries of their evidence—a procedure specifically endorsed by the Judicial Conference of the United States. *Handbook of Recommended Procedures for Trial of Protracted Cases*, 25 F.R.D. 351, 398 (1960). This would have constituted neither "a trial on the entire congeries of factors bearing on settlement" (G.M. at 12) nor a proceeding "even more complex" than trial (D.M. at 17). But it would have enabled the district judge to approach a difficult judicial task knowing what the case was about.

To suggest that such knowledge is neither "necessary or desirable" (D.M. at 15), or to infer that an effort to obtain such knowledge "would be inconsistent with both the constitutional nature of the judicial power and traditional concepts of the adversary process" (G.M. at 13) is to attempt to deprive the district judge of the ability to perform meaningfully what is concededly a judicial function. Furthermore, the procedure we suggest is neither novel nor unprecedented. See *United States* v. *Standard Oil Co.*, 1959 Trade Cas. ¶ 75,522 (S.D. Calif.); cf. *United States* v. *Grinnell Corp.*, 385 U.S. 563, 581-582.[4] Indeed, we

[3] Surely such proceedings do not constitute the "taking of evidence" for if that were the case, this consent decree already has *prima facie* effect. The City of New York has never contended, and we do not now contend, that the District Court was required to hear a witness give testimony.

[4] It is, moreover, the Department's standard practice in criminal antitrust cases disposed of by *nolo contendere* pleas to supply the district judge with a statement of its position and a summary of the evidence.

can think of no other way—and appellees have suggested none—by which the district judge can "know the record." *United States* v. *Ward Baking Co.*, 376 U.S. 327, 333.

4. In considering the "public interest issue" after remand, the District Court is not required to choose between rejecting the decree outright or requiring the inclusion of an "asphalt clause." It may grant or withhold its consent "upon performance of [any] condition which will safeguard the public interest." *E.g.*, *S.E.C.* v. *United States R. & Imp. Co.*, 310 U.S. 434, 455. For example, it could agree with the government "that the proposed judgment fully terminated all the defendants' allegedly anticompetitive practices" (G.M. at 15), but conclude that it did not *undo* them. It could therefore hold that the public interest would not be satisfied unless defendants installed antipollution devices on cars now on the road.[5] The government's fear (G.M. at 15-16, n. 11) that such relief is inappropriate in a government suit under Section 15 of the Clayton Act, 15 U.S.C. § 25, is patently unfounded. *Mitchell* v. *Robert De Mario Jewelry Co.*, 361 U.S. 283, 291-292; *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-398. And when the Department of Justice suggests (G.M. at 15-16, n. 11) that the states, their political subdivisions and others take on the task of securing the relief that the public interest requires, it abdicates the responsibilities which Congress has placed upon it. *United States* v. *Borden Co.*, 347 U.S. 514, 518-519.

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[5] The complaint alleged that on three separate occasions since 1961 the defendants conspired and agreed not to install antipollution devices on their automotive products. App. at 22a-23a. Such an antitrust violation is neither "novel and unadjudicated" (App. at 15a), nor "untested" or "unsound" (D.M. at 19).

5. Since it is conceded that approval or disapproval of a consent decree is an independent judicial act, the important question is how that act is to be performed. This question, one of first impression, is squarely presented for resolution. Is a district judge limited to examination of the complaint and decree as appellees apparently contend (G.M. at 14; D.M. at 18)? Is the court's inquiry limited to "legal" as opposed to factual considerations, as the trial judge apparently thought (App. at 14a)? Or, as we contend, does the court's duty to ascertain that the proposed decree is in the public interest carry with it the corresponding obligation to "know the record"? Resolution of this question is admittedly difficult, and involves not only application of legal principles but the delicate balancing of conflicting interests, including, not unimportantly, administrative economy and expediency. But this difficulty call for plenary—not summary—consideration.

Since the City's right to intervene depends upon the ultimate resolution of the issues tendered by this appeal,[6] an order should be entered postponing consideration of the question of jurisdiction until the hearing of the case on the merits. *Sam Fox Publishing Co.* v.

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[6] Defendants have suggested that the City obtained all the relief sought by its first intervention application, and that the second application was untimely (D.M. at 10-11, n.14). The first application sought intervention and alternatively sought leave to appeal as *amicus curiae*. Intervention was denied. The fact that the District Court granted the alternative relief and permitted the City to appear as *amicus* does not mean that the City obtained the relief for which it moved. The second intervention application was filed and considered before the expiration of the time for taking an appeal from denial of the first application. Such an application, permitting a single appeal from both applications, is hardly untimely.

United States, 366 U.S. 683. This case should not be decided summarily.

CONCLUSION

By reason of the foregoing, the motions to affirm should be denied.

Respectfully submitted,

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